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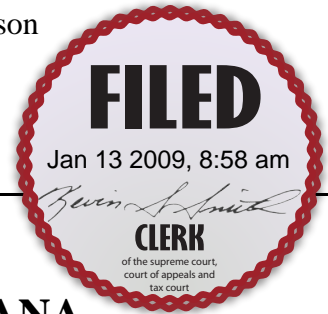
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**IN THE
COURT OF APPEALS OF INDIANA**

DEBORAH K. JOHNSON,
Appellant-Defendant,

VS.

INDIANA THOROUGHBRED BREEDERS
& OWNERS ASSOCIATION, INC.,

Appellee-Plaintiff.

No. 29A02-0806-CV-561

APPEAL FROM THE HAMILTON SUPERIOR COURT I
The Honorable David K. Najjar, Magistrate
The Honorable Steven R. Nation, Judge
Cause No. 29D01-0610-CT-998

January 13, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Deborah K. Johnson (Johnson), proceeding *pro se*, appeals the trial court's judgment in favor of Appellee-Plaintiff, the Indiana Thoroughbred Owners and Breeders Association, Inc. (ITOBA), on ITOBA's claim of check deception.

We affirm.

ISSUE

Johnson presents a single issue for our review, which we restate as: Whether the trial court abused its discretion by denying Johnson's motion for a continuance.

FACTS AND PROCEDURAL HISTORY

On October 12, 2006, ITOBA filed a complaint against Johnson alleging check deception. Specifically, ITOBA claimed the following:

7. That [ITOBA] offered certain equines for auction on or about the 20th day of November, 2004.
8. That [Johnson] purchased two (2) such equines at the said auction, namely:
 - a. A horse named Dark Denim for the price of \$848.00, and
 - b. A horse named Stetson Cab for the price of \$2,120.00.
9. That [Johnson] personally signed the Sales slips[.]
10. That [Johnson] tendered a total payment of \$2,968.00 by way of check number 3694 drawn on [Johnson's] personal bank account and signed by [Johnson].

* * * *

12. That said check was subsequently presented and dishonored by reason of "stop payment" instruction issued by [Johnson] to [Johnson's] bank.

13. That [Johnson's] actions are in violation of Indiana Code § 35-43-5-5 in that [Johnson] knowingly and intentionally issued a check to acquire property knowing that such check would not be paid.

14. That pursuant to the provisions of the said section of the Indiana Code, [Johnson] committed check deception.

* * * *

16. That because of [Johnson's] check deception, [ITOBA] suffered actual damages in the amount of \$2,968.00 plus a \$5.00 fee imposed by [ITOBA's] bank.

17. That pursuant to Indiana Code § 34-24-3-1, [ITOBA] may and hereby does seek damages as a result of violation of § 35-43 as follows: three (3) times the actual damages, plus the costs of this action, plus reasonable attorney's fees, plus other applicable and specifically allowed damages.

(Appellee's App. pp. 2-3).

On October 31, 2007, ITOBA served Johnson with several requests for admission under Indiana Trial Rule 36. Among other things, ITOBA asked Johnson to admit that: (1) she took possession of the horses after the auction; (2) she wrote a personal check to pay for the horses; (3) she instructed her bank to stop payment on her check; (4) her check was dishonored by her bank when presented for deposit by ITOBA; and (5) she has not paid any money to ITOBA for the horses. Pursuant to Indiana Trial Rule 36, Johnson's responses were due by November 30, 2007. However, at some point, Johnson called ITOBA's attorney to request additional time. On December 4, 2007, ITOBA sent Johnson a letter asking for responses by December 31, 2007. Johnson never responded to ITOBA's requests for admission.

On January 17, 2008, ITOBA asked the trial court to set a bench trial. On January 23, 2008, the trial court set a bench trial for March 13, 2008. On March 7, 2008, Johnson faxed a Verified Motion for Continuance to the trial court, stating: “I cannot be in court on the Date of 3/13/08 because of Emergency Family obligations in the State of Arizona. Our son-in-law was in an accident. We had to come to AZ. to care for our daughter and grandchildren, during this very difficult time.” (Appellant’s App. p. 7).

On March 13, 2008, the day set for the bench trial, ITOBA appeared by a representative and by counsel. Johnson was not present and was not represented by counsel. The trial court first addressed and denied Johnson’s motion for a continuance. ITOBA then presented its case. Upon ITOBA’s request, the trial court deemed admitted the facts stated in ITOBA’s requests for admission.¹ The trial court entered judgment in favor of ITOBA in the amount of \$10,721.00, which included treble damages, costs, attorney fees, and witness expenses.

On April 11, 2008, Johnson filed a Verified Motion to Set Aside Default Judgment (even though the trial court did not enter a default judgment). Again, Johnson explained that her son-in-law had been in an accident and that she had to go to Arizona to care for her

¹ Indiana Trial Rule 36 states:

The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney.

Here, Johnson had until December 31, 2007, to respond to ITOBA’s requests for admission but failed to do so. For obvious reasons, Johnson does not contend that the accident involving her son-in-law, which did not happen until February 12, 2008, had anything to do with her failure to timely respond to ITOBA’s requests.

grandchildren so that her daughter could be at the hospital and go to work. She also stated the following defense to ITOBA's check deception claim: "[ITOBA] sold horses as Agent for James E. Riddle to C.A.N.T.E.R. Inc. not to [Johnson]." (Appellant's App. p. 10). On April 25, 2008, after ITOBA had filed a response, the trial court denied Johnson's motion.

Johnson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Johnson argues that the trial court should have granted her motion for a continuance because she had a "family emergency in the State of Arizona." (Appellant's Br. p. 2). The decision to grant or deny a motion for a continuance is within the sound discretion of the trial court. *Rowlett v. Vanderburgh County Office of Family & Children*, 841 N.E.2d 615, 619 (Ind. Ct. App. 2006), *trans. denied*. Even if we find that a trial court abused its discretion by denying a continuance, we will not reverse if the moving party fails to show how she was prejudiced by the denial. *J.M. v. Marion County Office of Family & Children*, 802 N.E.2d 40, 43 (Ind. Ct. App. 2004), *trans. denied*. Johnson has failed to make such a showing in this case.²

As noted above, the trial court deemed admitted the facts stated in ITOBA's request for admissions. Essentially, those facts are that Johnson wrote a check for two horses but later stopped payment on that check and failed to otherwise pay for the horses. Indiana Trial

² ITOBA begins its brief with a motion to dismiss Johnson's appeal, pointing out that Johnson failed to comply with several rules of appellate procedure and that her contentions are not supported by cogent reasoning or citations to relevant authority. We agree that Johnson's brief is deficient in several respects, but it is at least apparent that she is challenging the trial court's denial of her motion for a continuance. Therefore, we deny ITOBA's motion to dismiss.

Rule 36(B) provides that “[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.” Johnson never asked to withdraw or amend her (deemed) admissions, and she does not appeal the trial court’s decision to deem admitted the facts stated by ITOBA. Without somehow challenging those admissions, Johnson cannot show how she was prejudiced by the denial of her motion. In other words, even if the bench trial had been postponed, the facts alleged by ITOBA would still have been deemed admitted because of Johnson’s failure to timely respond to ITOBA’s requests for admission, meaning that Johnson would have still been found liable for check deception.

To be safe, ITOBA alternatively treats Johnson’s argument as one that the trial court abused its discretion by denying Johnson’s motion to set aside default judgment. Johnson never even mentions the denial of that motion in her brief, so, to the extent she seeks to raise that issue, it is waived. Waiver notwithstanding, and even if that were her argument, we would reach the same result. As ITOBA notes, Johnson’s motion fell under Indiana Trial Rule 60(B)(1) (mistake, surprise, or excusable neglect). To obtain relief under that provision, the movant must allege a meritorious defense. In her motion, Johnson alleged: “[ITOBA] sold horses as Agent for James E. Riddle to C.A.N.T.E.R. Inc. not to [Johnson].” (Appellant’s App. p. 10). However, pursuant to Indiana Trial Rule 36, contrary facts were “conclusively established” when the allegations in ITOBA’s requests for admissions were

deemed admitted. Because Johnson does not challenge those admissions on appeal, Johnson cannot allege a meritorious defense to ITOBA's claim.³

CONCLUSION

Based on the foregoing, we conclude that it is unnecessary for us to determine whether the trial court abused its discretion by denying Johnson's motion for a continuance because Johnson has failed to show that she was prejudiced by the denial.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.

³ Johnson might contend that her motion fell under Indiana Trial Rule 60(B)(4), dealing with relief from a default judgment, but, as noted above, the trial court did not enter a default judgment. It held a bench trial and entered judgment on the merits. In any event, a motion under subsection (4) also requires the movant to allege a meritorious defense, which Johnson cannot do at this stage of the game.